

No. 86-643

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Supreme Court, U.S.
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JOSEPH F. SPANIOLO, JR.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

SOUGHIK ('SONIA') KAYZAKIAN,
Petitioner,

v.

THOMAS F. KRAJEWSKI, ETC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

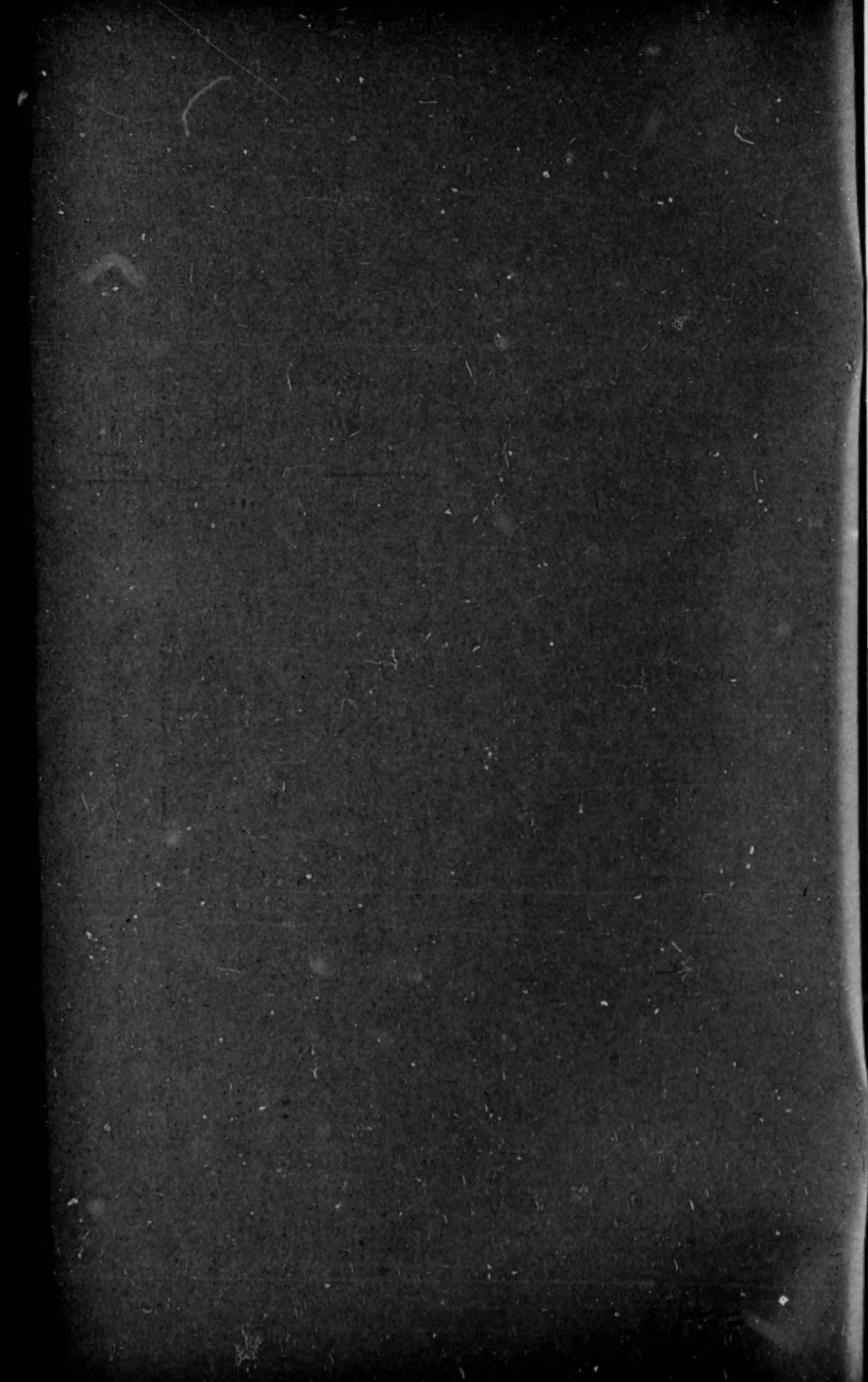
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33/100



QUESTION PRESENTED FOR REVIEW

Did the court below properly hold that the district court's dismissal with prejudice of Petitioner's action, pursuant to F. R. Civ. P. 41, was an appropriate exercise of discretion where Petitioner utterly failed to comply with the terms and conditions established by the court for the acceptance of a dismissal without prejudice?

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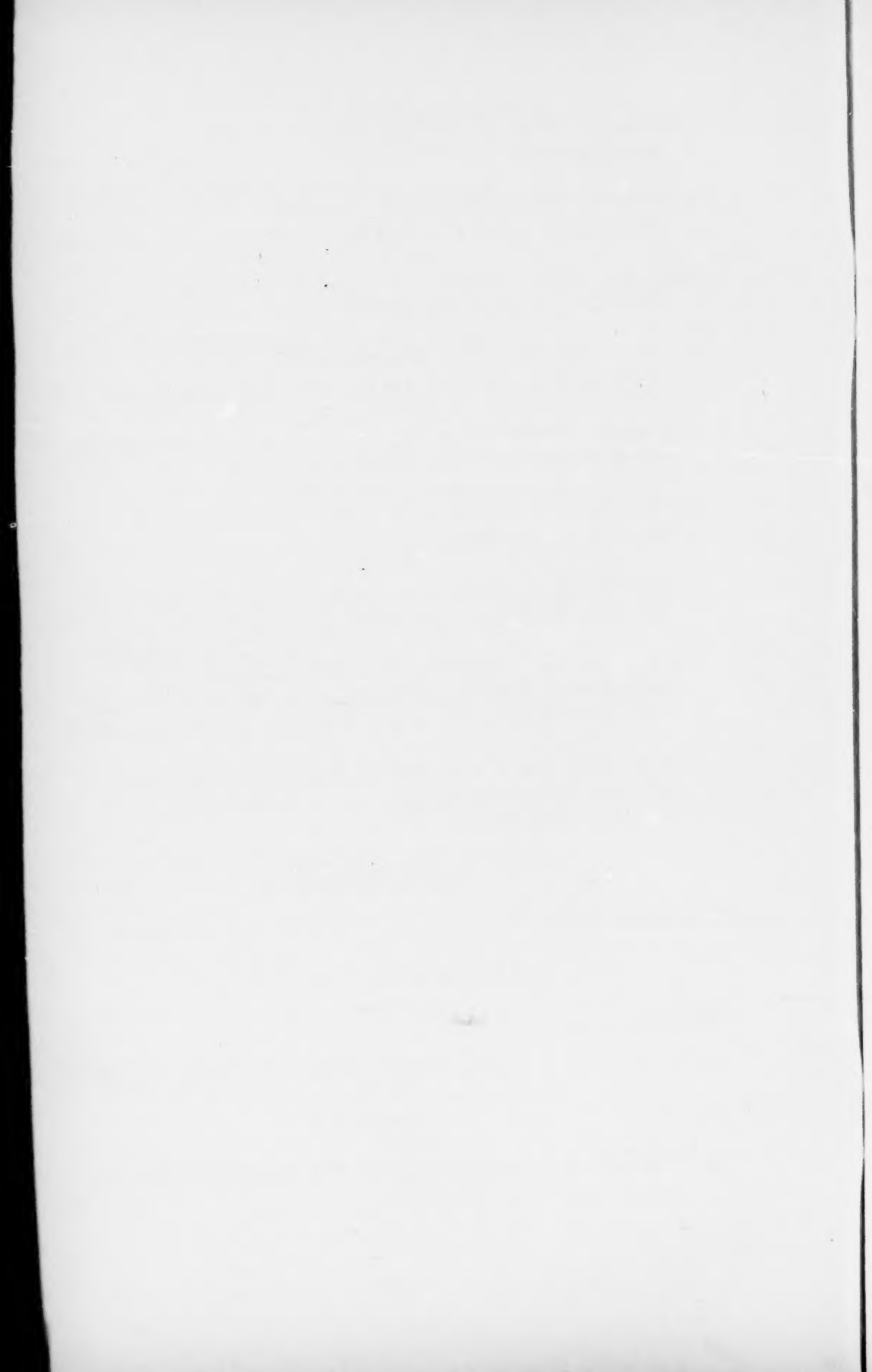
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October Term, 1986

SOUGHIK ('SONIA') KAYZAKIAN,

Petitioner,

v.

THOMAS F. KRAJEWSKI, etc., et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

STATEMENT OF THE CASE

Petitioner filed a complaint in the United States District Court for the District of Maryland on October 27, 1982. An amendment to the complaint was filed on November 29,

1982. Petitioner claimed that various employees of the Springfield Hospital Center and the Maryland Mental Hygiene Administration violated Petitioner's constitutional rights by reprisals against her for her having reported alleged medical neglect of two patients.

During the course of the litigation, the parties engaged in extensive and continuous discovery, including numerous depositions, interrogatories, and document requests. In a telephone conference with the court on October 17, 1983, subsequent to both the scheduled close of discovery and Respondents' filing of a motion for summary judgment, Petitioner's counsel for the first time disclosed an intention to amend the complaint again. Petitioner wished to add allegations that she had engaged in protected speech with respect to patients other than the two mentioned in her original complaint.

However, no written motion to amend was ever filed with the court.

In December, 1983, approximately one month before the scheduled trial date of January 3, 1984, Petitioner's counsel again disclosed an intention to amend the complaint and to introduce evidence concerning patients other than the two referred to in Petitioner's original complaint. After observing that no formal motion to amend had been filed, the court indicated it would not permit such an amendment. (Apx. a-23-24).

On January 20, 1984, the district court granted Respondents' motion in limine to exclude evidence concerning the alleged mistreatment of patients other than the two referred to in Petitioner's original complaint, explaining that discovery had concluded and that Petitioner had been aware of the excluded evidence in advance of the conclusion of discovery. (Supp. Apx. 1-4)

(See also Apx. a-63).^{1/}

On February 21, 1984, only three working days before the rescheduled trial date, Petitioner orally sought leave to dismiss her action without prejudice. Two days later, she submitted a written motion pursuant to Rule 41(a)(2). Petitioner's primary purpose in requesting dismissal of her suit was to avoid the court's pretrial rulings precluding her from enlarging the scope of the lawsuit beyond that which had been the basis for the extensive discovery which had occurred. (Apx. a-55).

Recognizing that a last-minute unconditional dismissal without prejudice would be unfairly prejudicial to the

^{1/}Supp. Apx. refers to the Appendix attached to this Brief in Opposition.

Respondents, the court offered Petitioner three options. The first was to proceed with the scheduled trial. The second was to dismiss without prejudice, under such terms and conditions, if any, as would alleviate the injury which a dismissal without terms and conditions would cause Respondents. The court noted that, at a minimum, an appropriate remedial condition would be a cash payment or bond in an amount compensating defendants for those fees and expenses that would not have been incurred had the Petitioner's proposed broader lawsuit been filed initially. The third option was to dismiss with prejudice. (Apx. a-70-77 and a-12-20).

Following discussions with her attorney, Petitioner rejected the first option and expressed interest in the second. (Apx. a-72-77). Both Petitioner and her counsel were aware that an inability to comply with the

court's ultimate terms and conditions could result in a "with prejudice" dismissal. Two days later, on February 23, 1984, the court issued a Memorandum and Order recounting the events that transpired at the February 21 hearing. (Apx. a-12-20). Therein, the court ordered Petitioner to inform the court in writing, on or before March 12, 1984, whether she was able to post a bond "to reimburse defendants for such costs and expenses, if any, as defendants may incur because of the need for repetitive work and proceedings in the new case which would not have occurred had plaintiff proceeded timely in the within case." (Apx. a-16). The failure to comply with this requirement, the court stated, would likely result in a prompt dismissal with prejudice. (Apx. a-18).

Neither Petitioner nor her counsel ever responded to the court's February 23 directive. Consequently, on March 13, 1984,

Respondents' counsel requested the court to dismiss Petitioner's action with prejudice. One week later, on March 20, 1984, by virtue of an unpublished Order, this action was dismissed with prejudice because of "(a) plaintiff's failure to supply the requested information as to bonding, and (b) the entire record in this case and for the reasons previously stated on the record, orally and in writing, by this Court." (Apx. a-22).

Petitioner then appealed to the United States Court of Appeals for the Fourth Circuit. In an unpublished opinion, that court affirmed the decision of the district court, concluding that Petitioner had failed to comply with the conditions set by the lower court and finding that the court's judgment was an appropriate exercise of discretion. The present Petition followed.

REASONS FOR DENYING THE WRIT

Further review of this case is plainly unwarranted. The Petition presents neither a substantial federal question, nor any novel or unsettled issue upon which the federal courts require guidance from this Court. The decision of the district court represents a proper exercise of the discretion granted under the Federal Rules of Civil Procedure. The court of appeals, therefore, correctly found no abuse of discretion.

I. The District Court Properly Dismissed Petitioner's Action With Prejudice.

F.R. Civ. P. 41(a)(2) expressly grants a court authority to impose terms and conditions upon the dismissal of an action. It is well established that such terms and conditions may include the payment of costs and expenses that the dismissal will cause defendants to incur. Yoffe v. Keller Industries, Inc.,

580 F.2d 126, 131, reh'g denied, 582 F.2d 982 (5th Cir. 1978), cert. denied, 440 U.S. 915 (1979); Home Owners' Loan Corp. v. Huffman, 134 F.2d 314 (8th Cir. 1943); 9 C. Wright & A. Miller, Federal Practice and Procedure §2366 (1971 and 1986 Supp.). Similarly, it is well settled that a dismissal with prejudice is appropriate where a plaintiff fails to meet the terms and conditions set by the court. Yoffe, supra; Davis v. McLaughlin, 326 F.2d 881, 883-84 (9th Cir.), cert. denied, 379 U.S. 883 (1964); Stern v. Inter-Mountain Telephone Co., 226 F.2d 409, 410 (6th Cir. 1955); De Filippis v. Chrysler Sales Corp., 116 F.2d 375 (2d Cir. 1940); cf. Costello v. United States, 365 U.S. 265 (1961) (construing F. R. Civ. P. 41(b)).

Within several days of the scheduled commencement of the trial in this action, Petitioner sought to dismiss her lawsuit

without prejudice in order to file a second suit containing additional allegations arising out of the same general claim upon which her original suit was based. The terms and conditions imposed by the court were appropriate for the protection of the legitimate interests of the Respondents. Moreover, the court correctly presented Petitioner with the option to proceed to trial if the terms and conditions were viewed by her as too onerous. See Yoffe, 580 F.2d at 131.

Petitioner elected to avoid trial and then utterly failed to comply with the court's requirement that she report by March 12, 1984, on her efforts to obtain a bond for Respondents' protection. That failure to report served as the basis for the district court's dismissal. (Apx. a-21-22). Therefore, it was Petitioner's failure to communicate with the trial

court, notwithstanding its order, rather than her failure to post the bond, which caused the dismissal with prejudice. By failing to report to the court as required regarding her efforts to obtain a bond, Petitioner waived her right to complain further regarding the amount of the bond. Accordingly, the issue of whether the requirement of a bond was too onerous was not before the court of appeals and is not properly before this Court.

The trial court's decision to dismiss Petitioner's lawsuit with prejudice was a legitimate, indeed essential, exercise of discretion. That exercise of discretion has been reviewed and found appropriate by the court of appeals. Further review here is plainly unwarranted.

II. The District Court Properly
Refused to Permit Petitioner
to Expand Her Lawsuit in an
Untimely Manner.

Petitioner complains that the district court improperly denied her counsel's request for leave to amend her first amended complaint. The court of appeals correctly found it unnecessary to address the merits of this issue. At no time did Petitioner ever file a motion for leave to amend that specified the particular changes envisioned. On several occasions following the expiration of discovery and the filing of defendants' motion for summary judgment, Petitioner's counsel did indicate a desire to add new defendants and new allegations concerning the alleged mistreatment of patients other than the two identified in her original complaint. However, even assuming that Petitioner properly preserved this issue for appellate review, the court below

correctly refused to overturn the district court's action.^{2/}

The district court found that Petitioner was aware of the allegations sought to be included in an amended complaint well in advance of her counsel's first oral indication of a desire to

^{2/}A trial court's denial of a request to amend a pleading may be reversed only for an abuse of discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, reh'g denied, 401 U.S. 1015 (1971); Murphy v. White Hen Pantry Co., 691 F.2d 350 (7th Cir. 1982); Roberts v. Arizona Board of Regents, 661 F.2d 796 (9th Cir. 1981). Although leave to amend, when properly requested, should be freely given, where the plaintiff has been guilty of undue delay or where there is prejudice to defendants, the trial courts possesses the discretion to refuse an amendment. Zenith, *supra*; Foman v. Davis, 371 U.S. 178 (1962); Svoboda v. Trane Company, 655 F.2d 898, 900 (8th Cir. 1981). Thus, circuit courts have frequently refused to find an abuse of discretion where, as here, a plaintiff attempts to amend a complaint subsequent to the conclusion of discovery. Roberts, *supra*; Svoboda, *supra*; Addington v. Farmer's Elevator Mutual Insurance Co., 650 F.2d 663, 666 (5th Cir.), cert. denied, 454 U.S. 1098 (1981).

amend. (Supp. Apx. 1-4). The attendant prejudice to Respondents which would have been occasioned by Petitioner's untimely amendment was readily apparent to the trial court. The introduction of new defendants and of allegations concerning numerous other patients would have required extensive and costly investigation and potentially massive amounts of rebuttal evidence pertaining to treatment decisions for each patient. Under the circumstances, it cannot be said that the district court abused its discretion.

III. The District Court Judge Was Correct Both In Refusing To Disqualify Himself And In Establishing The Conditions For The Mental Examination Of Petitioner.

Petitioner raises two additional claims, neither of which the court of appeals found worthy of mention.

First, Petitioner claims the district court judge erred in failing to disqualify himself pursuant to 28 U.S.C. §455. Simply put, however, she does not demonstrate that a reasonable person, knowing all of the facts, would believe that the court was not impartial. United States v. Story, 716 F.2d 1088 (6th Cir. 1983). Significantly, at the February 21, 1984 hearing, Petitioner's own counsel advised the court that Petitioner had filed her motion to disqualify, pro se, because counsel was unable to file such a motion in good faith. (Supp. Apx. 5-7). Furthermore, counsel admitted that he had not seen any evidence of favoritism toward the Office of the Attorney General as claimed by Petitioner. (Supp. Apx. 8-9).^{3/}

Second, Petitioner asserts that the trial judge erred in refusing to permit Petitioner's counsel to be present at

Petitioner's mental examination and that he erred in refusing to permit Petitioner to monitor her own tape recorder during the examination. The terms and conditions of a mental examination pursuant to F. R. Civ. P. 35 are within the discretion of the trial judge. Sanden v. Mayo Clinic, 495 F.2d 221 (8th Cir. 1974). Petitioner

^{3/}That the trial judge was familiar with one of Respondents' expert witnesses is not a factor requiring disqualification. See e.g., Plechner v. Widener College, Inc., 569 F.2d 1250, 1262-63 (3rd Cir. 1977). Petitioner's strained attempt to suggest a connection between the dismissal of her lawsuit and the court's consideration of the expert's statements regarding certain threats allegedly made by Petitioner cannot withstand even minimal scrutiny. The controversy over the expert's remarks ultimately played no part in the court's decision to dismiss the action. The terms and conditions which Petitioner failed to meet were imposed only because she requested an eleventh hour dismissal after extensive discovery and trial preparation. The facts upon which the judge based his ultimate dismissal were clearly acquired from his participation in the case and not from some impermissible extra-judicial source. See United States v. Grinnell, 384 U.S. 563 (1966).

cannot demonstrate any legal entitlement to the terms and conditions she requested, nor can she demonstrate that the trial judge's action was an abuse of discretion. Brandenberg v. El Al Israel Airlines, 79 F.R.D. 543 (S.D.N.Y. 1978) (counsel for party not entitled to be present at a mental examination). In any event, such issues are not worthy of review here.

CONCLUSION

Petitioner seeks yet another review of the factual predicate for the discretion exercised by the district court in dismissing this action. That exercise of discretion has already been found appropriate by the court of appeals. The Petition presents no substantial federal question which merits further review. Defendants respectfully request,

therefore, that the Petition for Writ of
Certiorari be denied.

Respectfully submitted,

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SUPPLEMENTAL
APPENDIX



[563]

THE COURT: Okay.

Now, with regard to the next point, defendants seek to exclude evidence concerning Springfield patients other than Finkelstein and Frank.

Now, there, this goes to Mr. Marr's attempt to amend the pleadings to show generally bad conditions at Springfield and I said on December 9, 1983 and December 12, 1983 that plaintiff could not amend and I ruled that way and therefore the motion in limine as to the evidence in this category is granted.

There are not going to be any more amendments. When you came into the case, Mr. Marr, I gave you liberal opportunity following in the footsteps of other counsel and you are not going to amend again.

It is not fair. Discovery, extensive discovery has been held, it has been

concluded and this case is reaching trial and it is not going to go off again because new avenues are opened, with all of the opportunities that plaintiff has had up to now to say what -- to allege what plaintiff wanted to allege.

MR. MARR: Excuse me, Judge.

THE COURT: Now, I have covered -- what?

MR. MARR: I just wanted to point out that I had given the names in discovery of those people, Your Honor.

THE COURT: What?

[564]

MR. MARR: I just wanted to point out for the Court's benefit that the names of those people were given during the course of discovery in connection with supplemental answers.

THE COURT: Not for the first time.

MR. MARR: No, no, I understand that, but --

THE COURT: The plaintiff knew about these other patients before, did she not?

MR. MARR: Yes, Your Honor, she did --

THE COURT: All right.

MR. MARR: -- but --

THE COURT: That is her problem.

MR. MARR: Your Honor, if the Court please, I really caused her to reflect and to think of the names. She had no way of giving the names.

THE COURT: That is --

MR. MARR: She knew there were others.

THE COURT: That is up to counsel to have done long before in terms of allegations. You do not wait till you get this far along.

MR. MARR: I agree, Your Honor. I'm not saying that it's an allegation now in this case. I'm not seeking to amend. I just --

THE COURT: The fact that this came about through discovery is not something that

helps you. If something [565] new comes up in discovery that plaintiff did not know of could not reasonably anticipate, that is one thing. Where a plaintiff is alleging that she got cancer as a result of being exposed to conditions in a plant and new evidence comes along about new causes of cancer based on new behavior that plaintiff did not know about, that is one thing, or did not have reason to believe would be important.

But plaintiff knew about these patients other than Finkelstein or Frank. She did not make those points earlier. They were not made in the original pleading complaint, they were not made in an amended complaint, and they are not coming in now.

Now, we will move on.

* * *

[674]

* * *

There was another matter, however, that Mr. Marr mentioned and he said that his client would be filing today [675] a motion for disqualification of judge due to bias or prejudice.

Ms. Kayzakian filed that in proper person today and it was received in this court today.

Have you seen a copy of it, Ms. Meredith?

MS. MEREDITH: Just now, Your Honor, I did and I read it.

THE COURT: You have a copy?

MS. MEREDITH: Yes, Your Honor, I have.

THE COURT: All right.

Mr. Marr, do you want to be heard on that motion before I comment on it, or before I hear from Ms. Meredith?

MR. MARR: Well, Your Honor, I'm glad the Court brought that up because my client wants that matter disposed of before anything else is done --

THE COURT: It will be disposed of --

MR. MARR: -- with reference to this case.

THE COURT: -- first because in view of that motion, I will not do anything in this case until that motion is disposed of.

MR. MARR: Your Honor, I would like to explain to the Court why I didn't file the motion and why it was done pro se. I think the Court is entitled to that explanation.

I indicated to my client that I felt that it would be inappropriate to make this motion. My client initially [676] wanted me to make the motion. There was a discussion to -- for me to certify that it would be made in good faith under 28 U.S.C. 144 and I felt then that it would not be proper for me to do

that, not that I was questioning her good faith but I felt that it was inappropriate for her to file the motion under 144 and furthermore felt that it was inappropriate to file the motion under 455, which is what Dr. Kayzakian has chosen to do.

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* * *

THE COURT: Have you seen anything in this case at all, Mr. Marr, that would indicate to you that the Court has favored Ms. Meredith as an individual or favored the office of the Attorney General?

MR. MARR: No, Your Honor.

THE COURT: As a matter of fact, I have been quite critical at times of Ms. Meredith in this case. At the start of the case, I told Ms. Sykes and Ms. Meredith that I was not going to have the kind of holding back of information that they started off with with your predecessors, Mr. Marr.

There have been some other suggestions. I think the other day I suggested to Ms. Meredith that she was being too hard-nosed, did I not?

MR. MARR: You did, Your Honor.

THE COURT: That was long before I heard
any news of this.

* * *